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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GERALD E. SMALLWOOD,
Petitioner,

v.

UNITED AIR LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Petitioner, Gerald E. Smallwood (hereinafter "Smallwood"), in reply to the Respondent, United Air Lines, Inc., (hereinafter "United"), requests the Court to grant him a Writ of Certiorari.

United, in its brief in opposition to Smallwood's Petition for a Writ of Certiorari, makes numerous inaccurate statements of the record and proceedings in this case. The purpose of this Reply is to correct these inaccuracies. In contrast to United's request for this Court to rely upon the Fourth Circuit's statement of facts, Smallwood, for the reasons set forth in his Petition, urges the Court to review the transcripts of the proceedings for a fair statement of facts.

ARGUMENT

I. United Interjects "Facts" at This Stage of the Proceeding That Were Never Introduced as Evidence and Never Accepted as "Facts" by a Court.

In its Factual Background and Argument, United states that it had a lawful basis for not hiring Smallwood because he failed to meet minimum medical qualifications for hire. (Respondent's Brief in Opposition at 2, 4, 6, 15). United asserts that this position as "fact" even though it never put on one shred of evidence, at either hearing, as to a medical disqualification, and even though no court in this long-litigated case made a determination of medical disqualification. In fact, the District Court specifically refused to reopen the record to hear United's argument on this point. United's attempt to interject this argument as "fact" at this point of the proceedings, despite the well-established rule that the argument of the parties on appeal cannot substitute for findings by a trial court, *E.E.O.C. v. United Virginia Bank, et al.*, 555 F.2d 403 (4th Cir. 1977), is typical of the erroneous representations it makes throughout its Brief.

II. The District Court did not Confine the First Trial to the Issue of Liability.

United repeatedly characterizes the District Court as "refusing evidence" on its would-not-have-hired-anyway defense and "confin[ing] the trial" to the liability question. (Respondent's Brief in Opposition at 3, 7, 8, 9). A review of the transcript shows the District Court did nothing even close to what United claims. Excerpts from the transcript make this clear:

> THE COURT: Gentlemen, insofar as the order of proof is concerned, the defendant concedes that it differentiates . . . on the basis of age. It seems to me, therefore, except for the damages by the plain-

> tiff, the burden is on the defendant to prove its exemption under the BFOQ. . . .
>
> MR. STUCKI: . . . If the Court rules that establishes a prima facie case, then indeed the only matter to be left would be the matter of damages.
>
> * * * *
>
> THE COURT: What's the purpose of this examination?
>
> MR. STUCKI: The purpose of this matter will go to damages, your Honor . . . It is a question as to his qualifications as to whether he would have been hired by United Airlines [sic] in light of the basis for the discharge. And in that respect it goes to the matter of damages.
>
> THE COURT: All right. Go ahead.

11/28/79 Trans., pp. 3, 101-102. *See also* 11/28/79 Trans., pp. 7-8, 101-11, 119-22, 213-14; 9/10/82 Trans., pp. 5-10.

Indeed, if the District Court had desired to bifurcate the trial, it would have sustained Smallwood's objection following the exchange quoted above. 11/28/79 Trans., pp. 102-03.

United uses the bifurcation facade to justify its supplementation of its weak evidence showing at the first hearing. United admits that its only evidence was the ONA System Board of Adjustment decision, with the opinion of the Neutral Referee, and the testimony of Volz. (Respondent's Brief in Opposition at 7). The decision and the opinion existed prior to the first hearing, as evidenced by their dates, and United's own admission.

> Thus, it was not until *preparation for the initial trial* that another basis for Smallwood's disqualification became known to United. At this time, it was learned that Smallwood had been fired by ONA for violations of its regulations . . . .

(Respondent's Brief in Opposition at 2) (Emphasis added). Despite its prior knowledge, without any asserted justification, United failed to present the evidence at trial. Volz was listed as a witness for United at the first trial, but United, for reasons unknown, did not call him to testify. Clearly, the District Court would have admitted this evidence at the first trial had United presented it. *See, e.g.*, 11/28/79 Trans., p. 108. United chose not to present the evidence and instead fabricates the bifurcation argument to minimize the impact of its first evidentiary failure.

Interestingly, United argues that the reopening of the record was correct, not only because of the bifurcation, but also because of the "increased significance of the question whether Smallwood would have been denied employment for reasons other than age." (Respondent's Brief in Opposition at 8). Since United could not have known prior to trial how the Court would rule on its BFOQ defense, its other defense was equally important to defeating Smallwood's claim. It has become no more, nor less, important with the passage of time.

III. A Trier of Fact Is not Obligated to Accept Evidence as Fact, Even if It Is Uncontradicted, if It Is not Persuasive.

United argues repeatedly that it presented uncontradicted evidence through its witness, Volz, of its policy not to hire applicants of questionable good faith and that, thus, it would not have hired Smallwood. (Respondent's Brief in Opposition at 7, 10, 11). Even if this were true, which Smallwood has argued to the contrary in his Petition (Petitioner's Brief at 11-17), such evidence is not required to be accepted as fact by the finder of fact, whose job it is to access credibility. *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401 (1899). Even the Fourth Circuit's opinion supports this position by applying the clearly erroneous standard. If there were no

credibility question, the Fourth Circuit could have used a less stringent standard of review. *United States v. General Motors*, 384 U.S. 127 (1966); *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966). United cites no support for a contrary position. The District Court was simply not persuaded by the testimony of United's employee and United's argument that it would not have hired Smallwood because of its policy.

This type of finding is not only in keeping with rules governing the assessment of credibility but is entirely consistent with Title VII proceedings outlined by the Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), where the trier of fact must decide if the alleged lawful reason for non-employment of plaintiff by the defendant is merely a pretext for discrimination. The District Court may have concluded that United's concern over Smallwood's history with ONA was but a pretext, a reason it gave for not hiring Smallwood because of his age. This position is reinforced by United's failure to discuss with Smallwood his difficulties with ONA, an opportunity given to every other applicant listed by United as establishing its policy. (Appellant's Opening Brief to the Fourth Circuit at 14).

IV. There was no Reason for Smallwood to "Respond" to the Referee's Opinion.

United repeatedly stresses that (1) Smallwood did not respond to nor refute the contents of the Referee's Opinion, and that (2) a full examination of the ONA arbitration was necessary in this case. (Respondent's Brief in Opposition at 9, 10, 12).

The question presented to the District Court was: Given the fact of Referee's Opinion and the fact that Smallwood listed ONA as his employer on his application, would United have refused to hire Smallwood? *See* 11/28/79 Trans., pp. 105, 107. Contrary to United's argument, the resolution of this issue does not require

"the full examination of Smallwood's termination as a flight officer by his former airline employer." (Respondent's Brief in Opposition at 9). Since United either would or would not have hired Smallwood knowing these facts, the merits of the ONA arbitration are irrelevant.

It is precisely because the merits of the Referee's Opinion are irrelevant to the question presented that Smallwood did not deny or refute the allegations in the Opinion, certainly not because he thought they were accurate. A response to the merits would have been inappropriate, particularly given the District Court's repeated statement that it would not try the merits of the ONA dispute. 11/28/79 Trans., pp. 105, 107-08.

This is further sustantiated by the fact that the Referee's Opinion was admitted without a hearsay objection from Smallwood. Obviously, if the Opinion had been submitted for the truth of the matter asserted, it would have been objectionable hearsay. But, as a review of the transcript shows, it was not offered or accepted into evidence to prove the matters asserted therein, but, instead, to prove that there was an arbitration decision that said what it said. *See* 11/28/79 Trans., pp. 101-111, 119-122. Inasmuch as the Opinion was not offered for the truth of the matter asserted, any testimony Smallwood would offer on the merits of the ONA dispute would have been inadmissably irrelevant.

Until the Fourth Circuit's opinion issued, no one suggested that Smallwood should have defended himself on the merits of the Referee's Opinion in his case against United. In fact, the District Court was of the exact opposite view. It is disingenuous, at best, for United to attack Smallwood now on such a fabricated point.

V. A Writ of Certiorari Has Been Granted in *Phyllis A. Anderson v. City of Bessemer City, etc.*

In his Petition, Smallwood cited and relied upon a Petition for a Writ of Certiorari in *Phyllis A. Anderson*

v. City of Bessemer City, Etc., No. 83-1623, as fully briefing the extent to which the Fourth Circuit has undertaken a pattern of *de novo* review and reversal of district court decisions in favor of plaintiffs in employment discrimination cases. The Court granted Anderson's petition. In addition, the Court agreed to hold another petition for a writ of certiorari in *Lula B. Miller v. Mercy Hospital*, 720 F.2d 356 (4th Cir. 1983), *cert. pet. pend.*, No. 83-1629, until disposition of the *Anderson* case. *Miller*, like *Smallwood*, was one of the cases cited in Anderson's petition as establishing this reversal pattern at the Fourth Circuit. *See* Petition for Certiorari, *Anderson v. City of Bessemer City, Etc.*, No. 83-1623, pp. 14-16. Consistency suggests that Smallwood's petition should likewise be granted, or at a minimum, be held pending the Court's decision in *Anderson*.

CONCLUSION

For the reasons stated herein and in his Petition, Smallwood respectfully requests this Court to grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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